CIVIL LIABILITY REVIEW– Comments and Submission to the Ministry of the Attorney General, Province of British Columbia

by

Gregory J. Levine
General Counsel
Office of the Ombudsman

on behalf of the

Office of the Ombudsman,
Province of British Columbia

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The Ministry of the Attorney General initiated a consultation process regarding civil liability review in April of this year when it posted a paper entitled "Civil Liability Review – Consultation Paper" on its web site. The paper reviewed six major areas of civil liability: joint and several liability, limitations, costs of class proceedings, vicarious liability, non-delegable duties, and structured damage awards. It did not directly state positions but asked questions and invited comment.

Statements by the Attorney General himself as well as the way questions were raised in the paper lead one to an understanding that there is a preference for limiting liabilities and the means to find liability. In his address to a CLE conference in November, 2001, the Attorney General emphasized the growth of liability, forms of liability and liability damage awards; chided academics and judges for not giving enough attention to "predictability, certainty and practicality"; noted that other jurisdictions had reformed laws around joint and several liability and other areas; and called for reform in this province[1]. Later, in February, 2002, the Attorney General reiterated his concerns and announced that there would be a civil liability review and a consultation paper would be released related to it[2].

The potential limitation of means of redress is of concern to the Ombudsman. In a direct sense, much of what is being reviewed bears on court operations and decisions, but it also sets standards which will influence redress in non-judicial settings as well. Such limitation will effect both expectations of those seeking redress and the substantive redress available to them and, in this context, are of interest and concern to the Ombudsman.

Of particular concern at this time are possible restrictions on the law related to joint and several liability, vicarious liability and non-delegable duty and the possible enhancement of costs in class action proceedings. Depending on the restrictions and enhancements there may be a serious limitation of possible redress.

With respect to joint and several liability, the consultation paper notes the problem of liability falling on "solvent defendants". This, it argues, can work an

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[1] Hon. Geoffrey Plant "Civil Justice in the 21st Century – The Way forward: The Text of an Address" in "Stay Current ", Nov.30, 2001, CLE Web Site at: http://www.cle.bc.ca/cle/stay+current/collection/2001/11/01-misc-plant.htm

[2] Hon. Geoffrey Plant "AG Forecasts Law Reforms and Asks for the Bar's Input" in "Stay Current", Feb.12, 2002, CLE Web Site, http://www.cle.bc.ca/cle/stay+current/collection/2002/2/02-misc-plant2.htm

unfair burden where one sees fairness as bearing the burden which is one's share as opposed to assuming what seems like another's burden. The term "joint and several" means "together and in separation. If two or more people enter into the obligation that is said to be joint and several their liability for its breach can be enforced against them all ...or against any of them..."[3]. Where joint and several liability is a contractual matter, the parties presumably know the nature of their arrangement and are presumably ready to bear the burden of it. The problem arises when there is tortious behaviour and the discussion of the consultation paper focuses on BC's *Negligence Act*. That Act imposes joint and several liability where there are two or more persons at fault[4]. Eliminating this "burden' may leave those who suffer injury without much potential for redress in certain cases. Certainly the concern of the Attorney General is legitimate but caution should be exercised before going to a system of strict apportionment of liability on the basis of contribution to the damage.

With respect to class proceedings the paper asks about the pros and cons of expanding potential to award costs while noting that "the *Class Proceedings Act* serves laudable public policy goals." Cost awards are limited in the class proceedings context[5]. Expanding the potential for awarding costs may well have too great a chilling effect on potential litigation and may limit this means of redress which itself has the potential for seeking justice for a broad range of people in various circumstances.

With respect to the doctrine of vicarious liability, the paper notes that there is an expanding scope of vicarious liability and asks whether or not there is need for legislative reform. Vicarious liability in law is "responsibility in for the misconduct of another person"[6] and more subtly may be seen as the "liability that a supervisory party (such as an employer) bears for the relationship between the two parties"[7]. The paper imbues a sense that the common law has gone too far somehow but this law reflects a growing sense of the intricacy of social relations and responsibilities in a complex society. Employers are often held accountable for an employee's actions because it is they who control the employee and benefit from his/her actions[8]. Altering or restricting the growth of this area of law should only be done cautiously if at all and should reflect the common law's evolution of the understanding of responsibility of social actors who take benefits from the endeavour of others.

The paper, alleging that the conceptual foundations of this doctrine are uncertain and that the line of delegable vs non-delegable duties is difficult to draw, also asks whether or not there should be reform of the doctrine of non-delegable duty.

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[3] *Oxford Dictionary of Law* (1997), at 249.
[4] *Negligence Act* RSBC 1996, c.333, s.4(2). This subsection imposes joint and several liability and indicates that the parties indemnify each other.
[5] *Class Proceeding Act* RSBC 1996, c.50, s.37.
[6] *The Dictionary of Canadian Law* (1995), at 1328.
[7] *Black's Law Dictionary* (1999), at 926.
[8] A. Linden *Canadian Tort Law* (2001), at 515.

In tort, a nondelegable duty is "a duty that may be delegated to an independent contractor by a principal, who retains primary...responsibility if the duty is not properly performed"[9]. The idea of the doctrine is to ensure that those who bear a responsibility are unable to escape the burden of that responsibility by trying to allocate to someone else through contract. While a contractor will have responsibilities to his/her principal, he cannot be held ultimately responsible where the principal him/her/it self has a duty to fulfill an obligation. This doctrine applies to the Crown in such diverse areas as duties to care for foster children and to maintain highways[10]. It is unclear why the paper articulates the view that this area's conceptual foundation is unclear. What the doctrine stands for is the idea that duty and responsibility are to be borne by a person or entity charged with that duty or responsibility. Governments ought not to escape fundamental duties which they have been asked by the legislature to assume. In an era when accountability and responsibility are promoted with vigilance and passion it seems oddly inappropriate to restrict the ambit of this doctrine. It is again urged that caution be exercised in any restriction of this doctrine. The maintenance of the applicability of the doctrine is especially important in an era of privatization.

There is a tendency running through this paper, other consultation papers and current bills before the legislature for the government to seek out a limitation of liability for the Crown and those would do business with it[11]. While sound government financial management through minimizing risks and potential liability and protection of enterprises from litigation is in some sense prudent, the severe restriction of avenues of redress both statutory and common law will diminish accountability of both government and corporate entities and deprive individuals of fair and appropriate ways to seek compensation and rectification of wrongs done them.

[*Signed by GJL*] **October 1, 2002**

Gregory J. Levine
General Counsel

Date

[9] *Black's Law Dictionary* (1999), at 522.
[10] A.Linden, *supra*, at 516.
[11] E.g. Bill 53, the proposed Transportation Investment Act contains a severe limitation on Crown liability and the liability of "occupiers" of highways.